CQ454

AMERICAN FOREST
RESOURCE COUNCIL

September 20, 2002

NEPA Task Force
PO Box 221150
Salt Lake City, UT 84122

Re: *Federal Register* Notice and request for comments, July 9, 2002

Please accept these comments on behalf of the American Forest Resource Council (AFRC). The AFRC represents approximately 80 forest product businesses including manufacturers and landowners from small, family-owned companies to large multi-national corporations in twelve states west of the Great Lakes. Our mission is to create a favorable operating environment for the forest products industry, ensure a reliable timber supply from public and private lands, and promote sustainable management of forests by improving federal laws, regulations, policies and decisions that determine or influence the management of all lands. As such, AFRC's members are directly affected by Federal environmental and land management policies including but certainly not limited to the National Environmental Policy Act (NEPA).

Our experience with NEPA has been largely with management of forests by the Forest Service and Bureau of Land Management. The NEPA decisions by these agencies directly affect our members and the management of these public lands is generally governed by two-tiered planning process under the National Forest Management Act and the Federal Land Policy and Management Act, which presents unique and difficult planning and implementation issues. The NEPA process at it applies to federal land management planning and resource management is broken. Projects take too long to complete and are easily challenged for failure to meet the Council on Environmental Quality (CEQ) regulations.

The Federal Register notice requests ways to improve and modernize NEPA analyses and documentation and request examples of current best practices and specific opportunities to enhance the NEPA process. However, the nature and scope of the task force assignment should be expanded to clearly include amendment of the CEQ regulations. Otherwise, identifying "case studies" and "best practices" and implementing NEPA under the current regulations will be an exercise in futility.

These comments are organized according to the questions posited in the above referenced *Federal Register* notice. Following the questions, under item *F. Additional Areas for Consideration,* we offer more detailed comments on problems with the existing CEQ regulations and actions that can occur to address the problems which are two important issues that should be included in the scope of the NEPA Task Force's activities.

1500 S.W. First Avenue, Suite 330
Portland, Oregon 97201
Tel. 503.222.9505 • Fax 503.222.3255

A. *Technology, Information Management, and Information Security.*

Response: In general, we believe CEQ is placing too much emphasis on technology and information management. Our experience is that Federal agencies possess tremendous technological capabilities including Internet access, networking, integrated databases, natural resource environmental effects models, Geographic Information Systems (GIS), etc.

Despite these technologies, or perhaps because of them, the NEPA process has been more cumbersome—not less. Furthermore, CEQ should concern itself with its role as mandated in NEPA and subsequent executive orders. Specifically, CEQ can help improve NEPA by recommending changes to NEPA and revising its regulations at 40 C.F.R. 1500-1508, as explained in Section F of our Comments.

1. Where do you find data and background studies to either prepare NEPA analyses or to provide input or to review and prepare comments on NEPA analyses?

Those that actually conduct the NEPA analysis can best answer this question. Suffice it to say with existing technologies, the difficult task is not accessing data and information but sorting out the good from the bad and acquiring the most recent data and information available. Most of the data we use to prepare comments comes from the files of the agency preparing the NEPA document. Therefore, that data should be readily available to the public. Environmental groups have significant budgets to create and maintain GIS information systems and other databases that put other members of the public at a disadvantage in preparing comments on NEPA documents. To level the playing field, agencies will either have to simplify analyses or provide the means for less well-funded groups to review and apply data using the agencies' own models.

2. What are the barriers or challenges faced in using information technologies in the NEPA process? What factors should be considered in assessing and validating the quality of the information?

Barriers or challenges include comments to A.1 above. In addition, technologies such as GIS and predictive models must be carefully integrated into any analysis. By this we mean the models must be accurate and the questions posed must be carefully thought out. Output from such models is only as good as the data, modeling, and subsequent interpretation. These models do not replace the thought process that must ultimately lead to decisions.

Factors to consider in assessing and validating the quality of information are difficult to articulate. They should include the source, whether it's been peer reviewed, and its accuracy, among other things. As explained in more detail in Section F, any science-based information must not be junk science and must meet the standard for reliability established by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

The Task Force would be well advised to look at the Data Quality Rule (§515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001) and the Office of Management and Budget (OMB) final guidelines this past January (67 FR 369 January 3, 2002).

This rule is an attempt to address the data quality issue and the Task Force should avoid duplication.

3. Do you maintain databases and other sources of environmental information for environmental analyses? Are these information sources standing or project specific? Please describe any protocol or standardization efforts that you feel should be utilized in the development and maintenance of these systems.

Our organization does not maintain extensive databases of environmental information. However, we do keep historical information about whether national forests have met their planned timber sale targets and information about the economic condition of local communities. We support any efforts to standardize information that will allow proposed actions to be compared and permit the public to better use the data supporting the decision.

4. What information management and retrieval tools do you use to access, query, and manipulate data when preparing analyses or reviewing analyses? What are the key functions and characteristics of these systems?

We have few tools to review analyses prepared by the Forest Service and BLM. For example, we do not have access to the Equivalent Roaded Area model, the WATSED model, the WATBAL model, or the HABCAP model used to analyze watershed or wildlife effects. It might be helpful to make those models available on the Internet to allow the public to review the analyses performed by the agencies.

5. What are your preferred methods of conveying or receiving information about proposed actions and NEPA analyses and for receiving NEPA documents? Explain the basis for your preferences.

For small documents and notices, the preferred method is electronically, i.e. e-mail and websites. But for large documents, paper copy is preferred in addition to having electronic access. The reason is simple—hard copy is preferable and is an easier way to quickly digest the organization of the documents and determine which parts are of the greatest interest. Small documents can be printed easily. An electronic copy is very useful in conducting word searches of the document and finding specific details particularly for large multi-volume documents.

6. What information management technologies have been particularly effective in communicating with stakeholders about environmental issues and incorporating environmental values into agency planning and decision-making? What objections of concerns have been raised concerning the use of tools?

Websites and e-mail is very helpful. One problem however with websites is lack of uniformity and their transient nature because URL's change. Also, one National Forest's NEPA page(s) may be located differently than another's.

GIS is also a very helpful tool to demonstrate the spatial implications of proposed actions as well as spatially analyzing data. It would be helpful to standardize how GIS products can be shared

and viewed among different platforms. Not everybody has GIS capabilities but the GIS products can be shared by "jpg" files or other means. Having access to these types of products is helpful to disseminate and display such information.

7. What factors should be considered in balancing public involvement and information security?

The nature of the proposed action is a factor that should be considered in evaluating information security. An EIS for modifications to a nuclear power plant or dam might have heightened security requirements compared to an EIS for land management. If as we suggest, the public is given access to data bases and models to aid in review and comment on environmental documents, it would be important to have that access restricted so any corruption of the data or model available on the publicly accessible part of a website will not affect the original data and model used by the agency.

B. ***Federal and Inter-governmental Collaboration.***

Response: In general, collaboration is problematic to say the least. Thought it's in vogue today, by its very nature it's time consuming.

An acute problem with collaboration is there are no guarantees. Many individuals, interest groups, and other parties suffer from "participatory fatigue" due to excessive public involvement and collaboration and this is exacerbated when the final product is never implemented.

If collaboration is to be successful, there must be a higher degree of certainty that a proposal or modification will be implemented. While environmentally destructive proposals certainly should not be implemented, the vast majority of projects have undergone years of analysis and mitigation to minimize environmental effects and are derailed not because of environmental impacts, but because of ideological opposition. Outside parties that chose not to participate or simply don't like the outcome, must face a higher threshold to challenge actions completed through collaboration.

Furthermore, collaboration must start by clearly stating the bounds and by all parties involved "buying in" up front. Too often parties have nothing to lose and thus aren't sincere and genuinely interested in collaborating because it means compromise is necessary.

1. What are the characteristics of an effective joint-lead or cooperating agency relationship/process? Provide examples and describe the issues resolved and benefits gained as well as unresolved issues and obstacles.

With respect to joint-lead or cooperating agency projects, it's hard to offer substantive comments given the limited experience with the NEPA provision. We have seen CEQ's memorandum on this topic (January 30, 2002) and strongly support using a joint-agency/cooperating agency process.

Pursuant to CEQ's regulations, state and local governments may be granted joint-lead or cooperating agency status when the state or local government has "special expertise with respect to any environmental impact involved in a proposal (or a reasonable alternative) for legislation or other major Federal action significantly affecting the quality of the human environment." 40 C.F.R. 1508.5. Obviously, state, tribal and local governments possess special expertise relating to the analysis of federal proposals on the physical environment, customs, culture, and local tax base.

2. What barriers or challenges preclude or hinder the ability to enter into effective collaborative agreements that establish joint-lead or cooperating agency status?

Lack of understanding: (1) how the process works; (2) commitments both financially and otherwise; and (3) clear definition of roles and responsibilities.

3. What specific areas should be emphasized during training to facilitate joint-lead and cooperating agency status?

Address items listed in B.2 above as well as NEPA training for the cooperating agencies not already familiar with it.

C. *Programmatic Analysis and Tiering.*

CEQ regulations embrace a sound principle of "tiering" that was designed to streamline the implementation of projects by allowing the preparation of a programmatic EIS to be followed by subsequent EISs or EAs that would be more narrow in scope and would not have to repeat the environmental analysis contained in the programmatic EIS. 40 C.F.R. § 1508.28. In practice, agencies have created too many layers of environmental analysis, which delays the site-specific environmental analysis necessary to ultimately support taking action. Because the programmatic documents take years to prepare, by the time the environmental document is finally prepared for the project, the information in the programmatic EIS is outdated and cannot be used in the project level environmental document. The project level environmental document must then stand on its own analysis, or update and repeat the inadequate or outdated analysis in the programmatic EIS.

1. What types of issues best lend themselves to programmatic review and how can they best be addressed in a programmatic analysis to avoid duplication in subsequent tiered analysis? Provide examples describing the nature of the decision, factors used to evaluate the appropriate depth of the analysis, and efficiencies gained by tiering.

As explained in Section 2, there are no obvious issues that lend themselves to tiering.

2. Provide examples of how programmatic analyses have been used to develop, maintain and strengthen environmental management systems.

Unfortunately, our experience with the programmatic documents is that they are an ineffective tool and cannot serve the purpose for which they were intended, namely to streamline the

analysis needed for later projects that tier to the programmatic document. In particular, the Bureau of Land Management's resource management plans and the Forest Service's forest plans were to aid later implementation of projects. However, the Ninth Circuit Court of Appeals in particular, has held that the planning documents cannot be used to support the subsequent projects. See, Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1214 (9th Cir. 1998)(Forest Service forest plan); Kern v. Bureau of Land Management, 284 F.3d 1062, 1072 (9th Cir. 2002)(BLM resource management plan).

The Forest Service has attempted to support the implementation of projects by conducting comprehensive watershed analyses. Because the Forest Service has limited watershed analysis to describing the existing conditions and how the watershed functions, these have not been NEPA documents. Consequently, the Ninth Circuit has invalidated the Forest Service reliance on the programmatic watershed analysis. See, Blue Mountains Biodiversity, 161 F.3d at 1215 (Forest Service could not rely on Ecosystem Analysis); Idaho Sporting Congress v. Thomas, 137 F.3d 1146 (9th Cir. 1998). We strongly believe that the environmental analysis budget and resources are better spent on project rather than programmatic planning.

D. ***Adaptive Management/Monitoring and Evaluation Plan.***

Response: Adaptive management is a good concept but its track record is weak at best. We all know decisions are made with available information. We can't afford to wait for complete information because it's never complete. But, unfortunately, NEPA review presumes complete knowledge in a deterministic sense.

Every decision made has uncertainty and is based on limited knowledge. One problem with adaptive management is that an adjustment in one action may lead to adjustments made elsewhere. That is adaptive management occurs not in one area but across both spatial and temporal scales. It's difficult to conceptualize how one proposed action's environmental impact analysis can ever be structured to take this into account for these multi-dimensional changes.

1. What factors are considered when deciding to use an adaptive management approach?

Adaptive management should not be applied to approved NEPA projects where a NEPA decision already has been made, particularly where the private sector is implementing the project such as a timber sale. In some ways, the concept of adaptive management overlaps with the concept of amending NEPA documents in response to significant new information. "Adaptive Management" is not mentioned in the CEQ regulations. The current regulations addressing significant new information or significantly changed circumstances should be used or modified to address this issue rather than creating a whole new concept of "adaptive management" responsibilities under a new section of "adaptive management" in modified CEQ regulations.

2. How can environmental impact analyses be structured to consider adaptive management?

If adaptive management is used, it must be predicated upon monitoring because there is no need to change the decision or project unless monitoring reveals a significant change in circumstances.

Therefore, the environmental impact analyses may include specific monitoring requirements and thresholds beyond which a reanalysis may be required.

3. What aspects of adaptive management may, or may not, require subsequent NEPA analysis?

Only management changes that would result in significantly different environmental consequences should require subsequent NEPA analysis.

4. What factors should be considered when determining what monitoring techniques and levels of monitoring intensity are appropriate during the implementation of an adaptive management regime? How does this differ from current monitoring activities?

Monitoring is often the last priority of agencies because it is poorly funded and there is no uniform agreement on protocols necessary to conduct monitoring, particularly for wildlife species. It is also time consuming and expensive. Changes observed often can be as much a result of the influence of weather or other factors which are difficult to discern. For example, fluctuations in wildlife populations in a local area may be influenced by many factors, including weather and available prey, rather than by changes in vegetation. The monitoring factors selected should be more directly tied to a cause and effect relationship between the project and what is being monitored. Otherwise, the monitoring results lead to mere speculation about the influence of the project.

E. ***Categorical Exclusions.***

1. What information, data studies, etc. should be required as the basis for establishing a categorical exclusion?

An agency should be allowed to rely on its long established expertise in deciding what actions can be categorically excluded. A large and lengthy data intensive study should not be required to create a new categorical exclusion and the CEQ should set an acceptable level of minimal information needed to establish a categorical exclusion so the courts will not second guess the agency decisions and conclude that a decision to categorically exclude an action will always require an EIS.

2. What points of comparison could an agency use when reviewing another agency's use of a similar categorical exclusion in order to establish a new categorical exclusion?

If an agency is establishing a similar categorical exclusion that already exists in another agency the detail of analysis to justify the categorical exclusion should be less. The agency could obtain and incorporate any information used to establish the existing categorical exclusion.

3. Are improvements needed in the process that agencies use to establish a new categorical exclusion?

The process to establish categorical exclusion should be simple and prompt.

F. *Additional Areas for Consideration.*

Since its enactment by Congress in 1969, NEPA has dominated the environmental decision-making process of federal agencies. The statute itself is short, merely directing preparation of a "detailed statement" for "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(c). This brief direction gave rise to the environmental impact statement ("EIS") that lies at the heart of the NEPA process.

The Act also established the CEQ as an agency within the Executive Office of the President to advise the President and coordinate environmental decisions among federal agencies. In addition to the duties specifically listed in the Act, CEQ is responsible for adopting and amending regulations under NEPA. While Congress did not provide CEQ with regulatory authority, in 1977 President Carter granted CEQ authority to issue regulations through Executive Order 11991, 42 Fed. Reg. 26967 (May 24, 1977). CEQ thereafter adopted regulations ("CEQ regulations") providing agencies with guidance on how to implement NEPA, outlining when an agency must prepare an EIS, and detailing the steps to be followed in the actual preparation of the document. 40 C.F.R. § 1500-1517.7.

These regulations created an intricate procedural scheme that goes far beyond the bare words of the statute. They require agencies to follow a rigid, burdensome process for deciding whether an EIS is required for a project, including preparation of a separate document called an environmental assessment ("EA") that over the years has become more and more like an EIS. The EA and accompanying Finding of No Significant Impact ("FONSI") have become the dominant form of NEPA compliance: According to CEQ, since 1985 federal agencies have prepared approximately 500 EISs annually, while about 50,000 EAs are prepared each year. *The National Environmental Policy Act - the Study of its Effectiveness After 25 Years*. Council on Environmental Quality, (Jan. 1997) at p. 19. Two-thirds of all EISs are prepared by just four agencies -- Forest Service, Bureau of Land Management, Department of Transportation, and Army Corps of Engineers.

The CEQ regulations also vastly lengthened the time required to complete NEPA compliance by requiring agencies to prepare and publish a draft EIS, to accept, review and respond to public comments on the draft EIS, to publish a final EIS (sometimes with a second public comment opportunity) and then, at least 30 days later, to publish a decision on a project (called a record of decision) restating the major findings of the EIS. As a consequence of this required sequence of steps, few EISs are completed in less than 24 months.

The regulations also require agencies to expand NEPA analysis on a proposed action to study all other actions that may be "connected" to the proposed action; to analyze a large geographic range encompassing such connected actions; and to consider all "cumulative effects" of past, present and reasonably foreseeable future actions by private, state and federal entities – without providing clear guidance for deciding where and when the analysis should stop. The CEQ regulations also force agencies to redo their NEPA documents by requiring a supplemental EIS whenever new information or circumstances suggest a change in expected environmental impacts. Most of the NEPA cases that have flooded the courts in recent years are based on violations of the CEQ regulations.

Thus, while NEPA has accomplished a worthwhile goal of focusing agency attention on environmental values, in many instances it has created an arduous decision-making process that presents difficult compliance hurdles for inexperienced agency personnel, requires years of analysis and document preparation and millions of dollars of staff time, and is subject to the moving target of new information and the second guessing of the courts. Many worthwhile and environmentally-friendly agency projects are delayed for years and experience large cost increases solely as a result of required NEPA procedures that ultimately add nothing of value to a project's design or utility.

I. SPECIFIC AGENCY PROBLEMS WITH NEPA COMPLIANCE

Some of the current key problem areas in NEPA compliance are highlighted below:

1. NEPA law is primarily made by courts, constantly changes, and sometimes varies among judicial circuits. Agency personnel often lack expertise and resources to remain current on NEPA requirements.

Through NEPA's history the courts have had primary authority to determine the legal requirements of the statute. In the nine years between the enactment of NEPA and the adoption of the CEQ regulations, the interpretation of NEPA was left solely to the courts. Since 1978 the courts have still played a major role in interpreting the regulations. Therefore, much of the NEPA law that agencies must follow is dispersed among hundreds of court decisions. Sometimes these decisions produce conflicting interpretations for different geographic areas. (For example, designation of critical habitat under the Endangered Species Act requires NEPA compliance if it occurs within the geographic area of the Tenth Circuit, but not if it occurs within the geographic area of the Ninth Circuit.)

The dispersion, inconstancy and conflicts among these court decisions place federal agency personnel in a difficult position of having to prepare environmental documents where some of the important rules governing preparation cannot be found in the CEQ regulations or anywhere else except through an encyclopedic review of three decades of NEPA court cases. Consequently, NEPA documents are sometimes deficient because agency personnel are not aware of, and do not know how to comply with, the judge-made NEPA rules.

2. Enormous time and energy must be expended to demonstrate that an EIS is not required for a project.

An EIS must be prepared when an agency finds that a major federal action may significantly affect the quality of the human environment. Because preparing an EIS is a costly and slow process, agencies seek to avoid a "significance" finding by downplaying environmental impacts, scaling back the project or increasing mitigation measures. At the same time, EAs have become more and more like an EIS in size, scope and cost. As a practical matter, a project supported by an EIS receives more deference from the courts than a project supported by an EA. If the burden

of preparing an EIS were made more manageable, agencies might find it more efficient to prepare an EIS for a project rather than risk a court rejecting its EA and FONSI.

3. FONSIs often do not contain adequate findings supporting a non-significance decision.

Agencies often poorly document their findings of non-significance required by the CEQ regulations, especially those that assess the context and intensity of the action as required by 40 C.F.R. § 1508.27. The CEQ regulations contain no direction on what must be contained in a FONSI, which is often a separate document from the EA, and does not effectively incorporate the analysis of the EA to support the decision. Consequently, agencies are vulnerable to having courts overturn their EAs and FONSIs.

4. The continuing duty to supplement environmental documents for "new information" both during and after the original NEPA process slows the process and disrupts implementation of approved actions.

In this Age of Information new scientific studies and research reports on a vast range of subjects are completed daily, sometimes by objective scientists and sometimes by advocacy groups posing as independent researchers. The courts have continually ratcheted up agency duties to address this torrent of information both during and after an initial NEPA decision-making process.

Given that it takes years to prepare an EIS, an agency must repeatedly backtrack to incorporate new information into the environmental analysis before the EIS is completed. Seattle Audubon Society v. Espy, 998 F.2d 699 (9th Cir. 1993) (rejecting agency programmatic EIS based on failure to adequately consider new information that arose in final stages of EIS preparation).

After an EIS is complete, the CEQ regulations require a supplement to the EIS when there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. 40 C.F.R. § 1502.9. The courts have held that there is a "continuing" duty to respond to new information to determine if a supplemental EIS is required. Idaho Sporting Congress v. Alexander, 222 F.3d 562, 566 (9th Cir. 2000). When the new information addresses a wide-ranging wildlife species such as the salmon or goshawk, supplements to hundreds of environmental documents can be required. Supplementation has also been extended to EAs, even though there is no regulatory requirement for such supplementation.

5. An expansive view of "connected actions" enlarges and complicates environmental analysis.

Actions that are "connected" must be considered together in the same EIS. 40 C.F.R. § 1508.25; Thomas v. Peterson, 753 F.2d 754 (9th Cir. 1985). Whether it involves different segments of a road project, parts of an airport improvement project, or forest rehabilitation, courts have ordered agencies to evaluate the impacts of all the connected actions in one environmental document,

even though the agency may not have funding for the other actions and wants to act more quickly by narrowing the scope of its review to a single action.

6. Agencies find it difficult to properly "tier" subsequent project EAs to previously prepared programmatic EISs.

CEQ regulations embrace a sound principle of "tiering" that was designed to streamline the implementation of projects by allowing the preparation of a programmatic EIS to be followed by subsequent EISs or EAs that would be more narrow in scope and would not have to repeat the environmental analysis contained in the programmatic EIS. 40 C.F.R. § 1508.28. In practice, agencies have created too many layers of environmental analysis, which delays the site-specific environmental analysis necessary to ultimately support taking action. Because the programmatic documents take years to prepare, by the time the environmental document is finally prepared for the project, the information in the programmatic EIS is outdated and cannot be used in the project level environmental document. The project level environmental document must then stand on its own analysis, or repeat the inadequate or outdated analysis in the programmatic EIS.

7. The use of categorical exclusions has been limited.

The CEQ regulations allow agencies to exclude an entire category of actions from the preparation of an EIS or an EA if the agency makes a formal finding that such actions do not individually or cumulatively have a significant impact on the environment. 40 C.F.R. § 1508.4. The courts have narrowly defined categorical exclusions. A decision in Illinois invalidated the Forest Service categorical exclusion for roadside salvage of scattered hazard trees killed by insects. Donham v. U.S. Forest Service, No. 98-CV-4289-JPG (S.D. Ill. 1999). This shut down the roadside salvage program throughout the country for over a year. The court ruled that the Forest Service did not adequately consider the environmental effects of the categorical exclusion. The same could be said for most agency categorical exclusions, and the court ruling leaves agencies vulnerable to a court invalidating their categorical exclusions.

8. Adequate analysis of cumulative effects is impossible because the term is a moving and subjective target.

The CEQ regulations require that an agency assess the direct, indirect, and cumulative effects or impacts of the proposed action. 40 C.F.R. §§ 1502.16, 1508.7, 1508.8, 1508.27. CEQ regulations define cumulative impact as:

> [T]he impact on the environment that results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

40 C.F.R. § 1508.7.

Cumulative impact is thus a moving and highly subjective target. What was not a reasonably foreseeable action when the environmental analysis started may become reasonably foreseeable

immediately before the EIS or EA is completed. Equally, what is not reasonably foreseeable to an agency during the EIS process may seem abundantly foreseeable to a judge exercising hindsight after a decision has been made. Failure to adequately analyze cumulative impacts invalidates an entire EIS or EA.

Agencies and the courts have had difficulty in defining the boundaries of cumulative effects analysis. Must an agency make an educated guess on what actions will occur on private lands during the life of the project? Over a decade following completion of the project? Compliance with cumulative impacts regulation has been so difficult for agencies that CEQ has issued a handbook entitled *Considering Cumulative Effects Under the National Environmental Policy Act* (Jan. 1997). The EPA followed this guidance with *Consideration of Cumulative Impacts in EPA Review of NEPA Documents* (May 1999) for use by EPA's reviewers of NEPA documents.

9. The lack of guidance on the geographic breadth of environmental analysis leads to second-guessing by the courts.

In an issue related to cumulative effects, agencies must choose an area to assess environmental effects, which extends beyond the project area. The analysis area could be a subwatershed, an entire watershed, or an even larger area. This becomes a problem in analyzing the effects of the action on wide-ranging wildlife species or wildlife with a large home range area. There is no agreement about the geographic area over which environmental effects must be analyzed. 40 C.F.R. § 1502.4(c) ("body of water, region, or metropolitan area" suggested for possible geographic scope of an EIS).

10. Data must physically be included in the environmental document or it will not be considered part of the administrative record.

Recent decisions in the Ninth Circuit have held that an agency cannot rely on data and analysis that is in an agency file but is not in the environmental document. Blue Mountain Biodiversity Project v. Blackwood, 161 F.3d 1208 (9th Cir. 1998). This will cause environmental documents to balloon even larger as agencies try to ensure that every relevant page of information is physically within the EIS or EA.

11. Difficulty of integrating NEPA with other statutory mandates (ESA, NFMA).

Agencies must comply not only with NEPA but also with their authorizing statutes and other environmental laws. The interplay between NEPA and other environmental laws often complicates and slows down the decision-making process. For example, the preparation of a Habitat Conservation Plan ("HCP") under the Endangered Species Act requires preparation of an EA or EIS, which repeats ninety percent of the content of the HCP. Although landowners are now encouraged by agencies to combine the two documents, challenges would be prevented if a regulation endorsed the practice of combining environmental reviews into a single document.

12. Multiple agencies involved in decision-making slow the process.

Although the CEQ regulations provided for a "lead" agency when multiple agencies are involved in complying with NEPA for a proposed action, the lead agency can be powerless to complete the NEPA process. For example, a record of decision can be delayed while waiting for the Fish and Wildlife Service or National Marine Fisheries Service to prepare a final biological opinion under the Endangered Species Act.

13. Geographically broad EISs increase risks of failure.

During the Clinton Administration agencies sometimes prepared a single geographically immense environmental impact statement to justify policy changes over vast areas of public land in the west. For example, environmental impact statements for the Interior Columbia Basin Ecosystem Management Project, the Sierra Nevada Framework Plan, and the Forest Service roadless area rule all were completed in December 2000 after years of effort and millions of dollars of cost. The scope of an EIS defines the risk associated with a legal challenge to the EIS. Environmental groups favor larger EISs and geographically expansive cumulative effects analysis because the large-area EISs provide a ready vehicle for halting projects over a wide geographic area. In contrast, if a flaw is found with a smaller project environmental document, invalidation of the document only stops the single project.

II. THE POWER OF THE CEQ TO IMPROVE THE NEPA PROCESS

NEPA created the CEQ and provides for its powers and duties. NEPA lists eight specific "duties and functions" of the Council: (1) assist and advise the President in the preparation of an annual Environmental Quality Report; (2) gather, analyze, and interpret information concerning environmental conditions and trends; (3) review and report on programs and activities of the federal government; (4) develop and recommend national environmental policies; (5) conduct investigations relating to ecological systems and environmental quality; (6) document, define, and interpret changes in the environment; (7) report annually to the President on the state and condition of the environment; and (8) prepare and furnish studies, reports, and recommendations at the President's request. 42 U.S.C. § 4344.

CEQ has also embraced the function of coordinating federal agency compliance with NEPA. Although the job of coordinator was not specifically given to CEQ by statute, the agency has acquired the role through the adoption of its NEPA regulations. As the unofficial coordinator, CEQ guides and assists federal agencies in their preparation of EAs and EISs. CEQ also has authority to review and comment on EISs. 42 U.S.C. § 4332(2)(C). However, due to the large number of EISs prepared each year and the scarcity of staff resources at CEQ, CEQ has not undertaken any systematic review of EISs. Instead, CEQ has chosen to review EISs under two circumstances: when the proposed action is of national significance, and when the proposed action has generated a disagreement between federal agencies over its environmental impact.

The next section discusses how CEQ can assist in fixing NEPA compliance problems, and suggests specific approaches to remove some of the current flaws in the NEPA process.

III. SPECIFIC PROPOSALS FOR AMENDMENTS TO CEQ REGULATIONS

CEQ could consider the following options to remove or reduce specific problems currently impairing the NEPA process. Some of these proposals are alternatives, and implementing one proposal may obviate consideration of another suggestion.

1. Eliminate environmental assessments.

The 50,000 EAs prepared each year for proposed actions without significant effect on the quality of the human environment are not required by NEPA. The statute requires no study at all of proposals that do not have significant environmental effects. The EA requirement was imposed in the CEQ regulations. Agency EAs are beginning to resemble EISs in size, preparation time and cost. CEQ could eliminate the EA entirely, or replace it with a simple process for documenting a finding of no significance. While this change might lead to an increase in the number of EISs, the savings in eliminating EA preparation costs and moving non-significant projects promptly forward could dwarf the increased costs of preparing additional EISs. This change would also have the beneficial effect of concentrating environmental analysis resources on those projects most in need of detailed study. Environmental groups might find this attractive because more truly "significant" actions would be evaluated in an EIS.

2. Eliminate the programmatic EIS.

Environmental effects result from actions on the ground. Programmatic decisions have no environmental effects unless carried out through actions. Programmatic EISs do not result in approval of on-the-ground actions without a second environmental analysis. Programmatic EISs could be eliminated, or merged with the project-level EIS that always follows. At a minimum, CEQ should state that agencies shall not prepare more than a single programmatic EIS prior to preparing the environmental document for a project. This direction would be particularly helpful to land management agencies that prepare the majority of programmatic EISs and are headed down a path of preparing multiple levels of programmatic EISs through regional, sub-regional and local planning before a project environmental document is ever prepared. See, Friends of Southeast's Future v. Morrison, 153 F.3d 1059, 1069 (9th Cir. 1998).

3. Clarify that a separate action is not "connected" to a proposal if the separate action is not funded at the time the notice of intent to prepare the EIS is published in the Federal Register.

In determining whether another action is connected to a proposed action and must be considered in the same EIS, agencies, the courts, and the public often argue whether the separate project is far enough along in its development to have ripened into an action that must be considered in the same EIS as the proposal. If there is a connected action that the agency ignored, then the EIS must be completely rewritten. A clear and narrow definition of connected action should be adopted that excludes any proposed separate project whose implementation is not funded at the time the agency publishes in the Federal Register its notice of intent to prepare an EIS. The CEQ should consider eliminating the requirement that connected actions shall be considered in the

same EIS. An agency may want to prepare an EIS for one action and later consider the combined environmental effects in an EIS for a subsequent action.

4. Delete consideration of cumulative effects.

CEQ should delete from its regulations the requirement for consideration of cumulative impacts. The elimination of the "worst case analysis" from the CEQ regulations did not destroy the environment or the quality of environmental analysis, as its defenders had predicted. Nor will a decision that agencies can limit their analysis to the direct and indirect effects of the proposed action without speculating on cumulative effects. Cumulative effects analysis is as difficult for agencies to perform, and as wide open to second-guessing from the courts to an even greater degree than, was worst-case analysis.

5. Expand the availability of abbreviated procedures by creating a new category of significant action called "Significant Action Needing Urgent Review".

Agency emergencies can justify alternative NEPA procedures under the current CEQ regulations only in very narrow circumstances. 40 C.F.R. § 1506.11. On average there have been only two actions a year where alternative arrangements have been allowed. Yet throughout the country there are far more than two emergency agency actions needing prompt NEPA approval. CEQ should create a new category of "significant actions needing urgent review" that would allow a NEPA process to be completed in less than six months. This could apply to many actions following natural disasters such as fires, floods, hurricanes, and windstorms, which may not rise to the level of a narrowly defined emergency but still require prompt remedial action.

6. Specifically define the geographic area over which environmental effects of an action must be analyzed.

CEQ should amend its regulations to include a clear definition of the required geographic scope of NEPA analysis. There is currently no consistent geographic area used to conduct NEPA studies. See *Forest Service Decision Making: A Framework for Improving Performance.* GAO Report RCED 97-71 (discussing need for CEQ to amend regulation to address problem).

During the last decade, the watershed has become increasingly favored by agencies to define the geographic scope of NEPA review. However, the size of a watershed varies widely. The Mississippi River watershed encompasses hundreds of millions of acres while some small watersheds are less than 5,000 acres. Theoretically, the geographic area selected should correspond with the area over which significant environmental consequences occur, but that boundary is often debatable, and frequently challenged in court. A highway project adding sediment to the Mississippi River watershed might not be considered significant, but could be significant when analyzed for a very small watershed. An agency should be able to meet its environmental effects disclosure obligation if it assesses the environmental effects on each subwatershed (generally containing 8,000-10,000 acres) in which the project occurs. Establishing a specific acceptable area for analysis in the regulations would prevent the courts from second guessing the appropriate geographic area for environmental analysis.

7. **If the EA is not eliminated, define the required content of a FONSI, and require it to be incorporated into the supporting EA.**

If the EA is not eliminated, then it is important to strengthen the sufficiency of EAs by explicitly supporting the more abbreviated analysis they contain. The FONSI contains the conclusion of no significant impact, but the analysis and reasons for the conclusion are usually detailed in the EA. The reasons and analysis often are omitted from the FONSI. CEQ should clarify what it considers as an adequate FONSI. CEQ should also require that the EA and FONSI be included in the same document, rather than separately, so that the analysis and reasons in the EA are clearly linked to the FONSI.

8. **Tighten the definition of "new information" that requires a supplemental EIS, and define the circumstances when an ongoing project or program must be halted until a supplemental EIS is completed.**

The "new information" which triggers the need for a supplemental EIS should be more narrowly defined so that an agency is not required to incur the substantial cost and delay of preparing a supplemental EIS unless the need for supplemental study is clearly established and the value of the study outweighs its cost. The CEQ Regulations should be amended to create a two-step process for agencies to decide whether to prepare a supplemental EIS for an ongoing project or program.

First, the regulations should establish a reliability threshold for new information, so that agencies are not continually forced to consume time and resources reviewing unreliable or unimportant information, and so that courts cannot interminably delay projects or programs to force an agency to do so. The regulations should state that an agency is not required to consider the need for a supplemental EIS unless a study or report containing new information is based on science that meets the standard for reliability articulated by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

Where new information meets the *Daubert* reliability standard, the regulations should require an agency to prepare a supplemental EIS on a project or program only if the agency makes three findings: 1) the new information presents clear evidence that the project or program is likely to have materially more harmful effects on the environment than disclosed in the original EIS for the project or program; 2) the agency lacks the authority to modify the project or program to substantially mitigate for the newly-disclosed effects unless it prepares a supplemental EIS; and 3) the value of the supplemental EIS is likely to exceed the cost of preparing the document.

The regulations should provide that when an agency decides a supplemental EIS should be prepared on an ongoing project or program, the agency must halt an activity that is part of the project or program until the supplemental EIS is completed only if the agency finds: 1) the activity is likely to cause serious and irreparable environmental harm before the supplemental EIS is completed; and 2) it would not be more cost effective to mitigate any such harm through other means. The regulations should provide that only specific activities meeting these two criteria shall be halted, and other ongoing portions of a project or program may continue at the discretion of the agency.

9. If the EA is not eliminated, eliminate the requirement for a supplemental EA.

If the EA is not eliminated, the CEQ could decide that supplements to EAs are not required. The CEQ regulations require supplements to EISs but are silent on whether supplemental EAs are required. Even though supplemental EAs are not specifically required by the regulations, agencies have prepared supplements to EAs. Because EAs are not required by the statute and EA supplements are not required by the regulations, it make sense to clarify that there is no requirement for a supplemental EA.

IV. CONCLUSION

CEQ has the power to streamline the NEPA process, and to eliminate most of the current agency problems with NEPA review, through amendment of its regulations or by issuing additional non-regulatory guidance, with no action required by Congress.

These comments present opportunities to streamline NEPA procedures to implement federal agency projects more promptly and less expensively while at the same time reducing the risks of courts delaying projects based on deficiencies in the NEPA documents. The comments discuss current impediments to a smoothly functioning NEPA process, and identify areas in which the NEPA process can be improved. The recommendations focus on the power of the CEQ to reform the NEPA process administratively, and discuss possible amendments to CEQ's NEPA regulations. Amending the NEPA statute is unnecessary to achieving any of the improvements identified below.

In closing, I'd like to strongly urge CEQ to convene one or more structured meetings or panels to have an exchange of ideas from outside the Federal government about current problems and needs for real change in the CEQ regulations. There are many people well versed in both the legal and practical application of NEPA outside the Federal government that we believe can contribute valuable information and experience. If you have any questions or would like to discuss these comments further, please call me at 503-222-9505.

Yours truly,

Thomas Partin

Thomas L. Partin
President